

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA :  
 :  
vs. : Case No. SA:19-CR-00063-DAE  
 : San Antonio, Texas  
HAE YEONG SONG(1), : December 8, 2021  
Defendant. :  
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TRANSCRIPT OF SENTENCING  
BEFORE THE HONORABLE DAVID A. EZRA  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

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S E N T E N C I N G

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1 *(Wednesday, December 8, 2021, 9:09 a.m.)*

2 \* \* \*

3 COURT SECURITY OFFICER: All rise.

4 COURTROOM DEPUTY CLERK: SA:19-CR-00063, United States  
5 of America versus Song.

6 THE COURT: All right. Can we have appearances  
7 please?

8 MS. RICHARDSON: Good morning, Your Honor. Bettina  
9 Richardson on behalf of the United States.

10 MR. CONVERY: Good morning, Your Honor. John Convery  
11 and Julie Hasdorff for Hae Yeong Song.

12 THE COURT: All right. Before we begin, counsel, have  
13 you had a full and ample opportunity to go over the presentence  
14 investigation and report including all conditions of supervised  
15 release with your client as laid out there, and that includes  
16 the special conditions and the conditions as laid out in the  
17 amended order of November 28, 2016 and file any objections you  
18 wish to file?

19 MR. CONVERY: Yes, sir.

20 THE COURT: Okay. Now, one of the reasons that I  
21 postponed the sentencing on Monday as I was told that the  
22 defendant's family wanted to be here or were going to be here  
23 and so I granted that request. And now I understand they're  
24 not here?

25 MR. CONVERY: I must apologize to the Court. That was

1 my understanding at the time that I conferred with the Court  
2 staff. Other events overtook those. They're in Maryland, Your  
3 Honor, and with omicron and the various things and the father  
4 didn't want to come without the mother and it's -- I appreciate  
5 your willingness to do that, to not do it on Monday. I don't  
6 mind and I didn't mind at the time that the defense was asked  
7 to postpone it if it was another day that's better for the  
8 Court, but at the time I did that, I believed they were going  
9 to fly to San Antonio. I know that they wanted to attend, but  
10 I have I think for the record and for the Court's purposes I  
11 conferred in the last 15 minutes with Mr. Song and he would  
12 like to proceed. He doesn't have to wait until his mother and  
13 father are here. The Court has letters and we'll discuss that  
14 later on.

15 THE COURT: All right. That's fine. Now, I also saw  
16 that one of your objections was that you had not had a chance  
17 to review the victim impact statements, but they've been  
18 provided, haven't they?

19 MS. RICHARDSON: I have those, Your Honor.

20 THE COURT: Has he seen them?

21 MR. CONVERY: No.

22 THE COURT: Well, you're asking for restitution, he  
23 wants to see the victim impact statements, so --

24 MR. CONVERY: I had asked -- the problem isn't the  
25 jurisdiction. We get the PSI, it talks about restitution. I

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1 object to the PSI. And in an unfortunate chain of events, the  
2 Probation Office is switching over to another communication  
3 method called Box. So the draft PSR or PSI languaged in Box, I  
4 don't know if the government got their copy, but the defense  
5 didn't even know it had been produced, the draft, until after  
6 the time for objections when the Probation Office just sent it  
7 to the Court. So we immediately said, Hey, we never received  
8 this, the defendants never received this.

9 THE COURT: Well, you did file objections.

10 MR. CONVERY: Yes. Ultimately I had to ask for a  
11 continuance then.

12 THE COURT: Right.

13 MR. CONVERY: I had to extend the date.

14 THE COURT: And the continuance was granted.

15 MR. CONVERY: And I did make the objections at that  
16 time. There's actually two sets of objections. I put this on  
17 the record because the second addendum says objections were  
18 filed here and objections were filed there and that's the  
19 reason for that.

20 THE COURT: All right.

21 MR. CONVERY: So I apologize.

22 THE COURT: We're right back where we started.

23 MR. CONVERY: So in the second addendum, the paragraph  
24 that deals with my objection concerning restitution says, The  
25 Probation Office just gets these and we can only give them to

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1 the Court. If you want to see them, you have to see them  
2 through the U.S. Attorney's Office.

3 I didn't know that. I mean, how would I know that?  
4 So that's the situation.

5 THE COURT: All right.

6 MR. CONVERY: But the focus of the objection was on  
7 the restitution, not that these people are victimized, not that  
8 they're part of --

9 THE COURT: What I can do is I can go forward with the  
10 sentencing and simply reserve the restitution for another day  
11 and in the meantime, you can review the victim impact  
12 statements, if that's what you'd like to do.

13 MR. CONVERY: When we get -- it's not the issue, I  
14 would tell the Court in the sentencing. It's not the issue,  
15 but --

16 THE COURT: Well, you objected to it, so it is an  
17 issue.

18 MR. CONVERY: Then I'll do that. I'll take the  
19 Court's time to do that.

20 THE COURT: It's either one way or the other.

21 MR. CONVERY: We can either put off the sentencing and  
22 allow me to do it then or if the Court desires to go forward  
23 with sentencing now and then put off the restitution issue for  
24 a separate hearing, I have no objection to that. At the same  
25 time, I could probably take a few minutes and do it today.

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1 THE COURT: It's up to you. What would you prefer to  
2 do?

3 MR. CONVERY: I prefer to do it today.

4 THE COURT: All right. So maybe we'll take a  
5 ten-minute recess, you can look at these, they're not very long  
6 and then we can proceed.

7 MR. CONVERY: I apologize for any inconvenience, Your  
8 Honor.

9 MS. RICHARDSON: I'm good with that, Your Honor.

10 THE COURT: You're good with that. All right. The  
11 Court will stand in recess for about ten minutes.

12 COURT SECURITY OFFICER: All rise.

13 (9:16 a.m.)

14 \* \* \*

15 (9:29 a.m.)

16 COURT SECURITY OFFICER: All rise.

17 THE COURT: Please be seated. Just noticed our flag  
18 is gone. We're moving courthouses, so I think they took the  
19 flags down to move them over to the new courthouse.

20 All right, Mr. Convery, you've had enough time to go  
21 over those reports?

22 MR. CONVERY: Yes, Your Honor.

23 THE COURT: And you're ready to proceed?

24 MR. CONVERY: Yes, Your Honor.

25 THE COURT: On July 21st of 2021, the defendant was

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1 found guilty by this Court during a bench trial of two counts,  
2 of a two-count indictment. One count charged receipt of child  
3 pornography in violation of 18 United States Code, Section  
4 2252(A) (a) (2) and 18 United States Code, Section 2252(a) (b) (1) .  
5 And count two charged possession of child pornography in  
6 violation of 18 U.S.C. 2252(A) (a) (5) (b) and 18 U.S.C.  
7 2252(a) (b) (2) .

8           There were no findings of fact and conclusions of law  
9 in this matter, which is what the Court would normally do,  
10 because the defendant expressly waived that and the Court  
11 simply found him guilty, as the jury would do without findings  
12 and conclusions. I will say, however, that the evidence in  
13 this trial was overwhelming as to the defendant's guilt.  
14 There's no question about that. All right, so the Court adopts  
15 the factual findings as contained in the report as to which  
16 there are no objections and I'll rule on the objections as  
17 follows: Objection number one, counsel has objected to  
18 paragraphs four, five and six. In paragraph four, counsel  
19 states the sexual assault charges investigated by the United  
20 States Army Criminal Investigation Command were dismissed. In  
21 paragraphs five and six, the defendant believes the brief  
22 summary of the text conversations between Song and Logo is  
23 inaccurate and misleading as several conversations are part of  
24 the single negotiation to obtain videos. He states that Song  
25 did not have child pornography on any other device and the

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1 negotiation with Logo for child pornography only occurred over  
2 one weekend. They were uploaded and viewed for a minimal  
3 amount of time and he paid less than 10 dollars for the photos  
4 and videos.

5 Now, paragraph four was revised to include that the  
6 original sexual assault charges were, in fact, dropped.  
7 Paragraphs five and six were not revised and the Court is going  
8 to overrule the objection. The portion of the conversation  
9 included in the PSR reflects the conduct of the defendant as  
10 being charged with in the instant offenses and was found guilty  
11 of, the inclusion of the conversation in its entirety does not  
12 appear to be necessary as the ultimate result is that the  
13 defendant negotiated and purchased child pornography which he  
14 viewed and had on his cellular phone for his own viewing  
15 purposes and pleasure. So the objection is overruled.

16 MR. CONVERY: Your Honor, do you want to wait until  
17 the end of your rulings or do this on an objection by objection  
18 basis?

19 THE COURT: Well, your objection is already in the  
20 record you filed extensive written objections.

21 MR. CONVERY: I want to point out for the record that  
22 what the Court is stating apparently comes from the Probation  
23 Office, so I object to the summary of my objection that doesn't  
24 include other things that were in the objection that are  
25 factual. That objection in writing is in the Court's file. I



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1 just need to note that for the record.

2 THE COURT: Counsel, I have reviewed carefully your  
3 full objection. I didn't just review the summary. The summary  
4 that the Probation Office prepared is something which I have  
5 reviewed and which correctly states my ruling on this. I adopt  
6 what they have said because they're correct. That's all I'm  
7 saying. I haven't overlooked your documents. I've reviewed  
8 them. I've got them right here. I don't just review the  
9 probation officer's summary, I never have. I've been a federal  
10 judge now for 35 years and nobody has ever suggested that I  
11 short shrift the defendant by just simply adopting what the  
12 probation officer -- in fact, I frequently don't adopt what the  
13 probation officer has suggested and, in fact, I did so earlier  
14 this week in a case where the probation officer said something  
15 that I disagreed with. So --

16 MR. CONVERY: Well --

17 THE COURT: I don't know what you're saying or what  
18 your argument is here.

19 MR. CONVERY: Well, I'm certainly not making a  
20 suggestion that the Court is giving my argument short shrift.

21 THE COURT: You've been in many sentencings with me,  
22 so you know better.

23 MR. CONVERY: Number two, I'm not making them. That  
24 wasn't the point and that's not the point.

25 THE COURT: I don't know what your point was.

1 MR. CONVERY: My point is that the Probation Office,  
2 that in this completely administrative procedure, they take the  
3 lawyer's objections which contain other important information,  
4 they filter it for the Court. All I really needed to know is  
5 that the Court had read my complete objections and had taken it  
6 into consideration.

7 THE COURT: Well, I did.

8 MR. CONVERY: But how would I know that? With all due  
9 respect.

10 THE COURT: Because you know me, first of all. You  
11 have practiced before me for eight years that I've been sitting  
12 here, number one. But number two, I've never been accused of  
13 in my entire career of simply taking the probation officer's  
14 material and adopting it. As I said, I frequently and I think  
15 I have even with this probation officer disagreed with their  
16 findings. And I think Ms. Richardson has been in those  
17 sentencings. I read everything. I read everything. Plus  
18 let's not forget I was the presiding judge at this trial and  
19 heard all of the evidence myself and made my ruling, so I  
20 understand that you might be -- that some lawyer who had never  
21 appeared before me and if I was some rookie judge, maybe have  
22 that concern, but I can assure you, Mr. Convery, that I have  
23 reviewed every document in this case. I've reviewed your  
24 objections. I was well aware of them and it just doesn't have  
25 any merit. You may disagree with me, you do disagree with me,

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1 but that doesn't mean that I in some way, shape or form have  
2 just simply done -- come up here to do some kind of a flippant  
3 job. That's not what has happened or has ever happened with  
4 me.

5 MR. CONVERY: Your Honor, I do wish, with all due  
6 respect, after these many years, that you wouldn't characterize  
7 it like that because that wasn't the objection. Factual basis,  
8 the offense conduct, there's information that didn't make the  
9 summary that I thought was important to the probation officer's  
10 determination and perhaps to the Court. If I didn't make that  
11 clear in the beginning, my first thing was did you want me to  
12 wait until the Court ruled on the objections or did you want me  
13 to do these individually. But there's no suggestion about how  
14 this Court conducts -- I have nothing but respect.

15 THE COURT: That's why I said to you, counsel, that  
16 you have filed extensive objections. If I would have just read  
17 this paragraph of theirs, I would not have made that comment  
18 because I couldn't have made the comment, but I did read your  
19 objections in their entirety. So you thoroughly covered the  
20 material.

21 Now, if you want to say something else for the record,  
22 you know, you have to remember now that the Court of Appeals  
23 because I -- you made it clear to me when you went to trial  
24 that the purpose of going to trial was to reserve your  
25 defendant's right to appeal, my denial of his motion to

1 suppress. Now, you should know that the Court of Appeals will  
2 get everything that is before the Court including your  
3 objections in their entirety. Right? You know that. So it's  
4 not as if we're playing hide the ball here. And you also know,  
5 as a matter of fact, that I regularly sit by designation on the  
6 United States Court of Appeals for the Ninth Circuit. I have  
7 for over 30 years. And as a matter of fact, I am leaving  
8 tomorrow morning to sit with them in Los Angeles to assist  
9 them. So I'm very well aware of the appellate process. And I  
10 approve of it and I have absolutely no problem at all  
11 whatsoever with your appealing my ruling.

12 Now, do I think I made the right ruling? Obviously.  
13 If I didn't think I was making the right ruling, I would have  
14 made another ruling, a different ruling. And have I suppressed  
15 evidence in the past? Many times, many times I have suppressed  
16 evidence even when the suppression of the evidence resulted in  
17 the government having to dismiss the prosecution. But in this  
18 case, the evidence, the finding of the evidence was  
19 consequential to a legitimate investigation. And for the  
20 reasons which I stated in my order, I did not believe that the  
21 evidence should be suppressed.

22 Now, look, it's going to get appealed to a three-judge  
23 panel of distinguished jurists. They're going to take a look  
24 at it and if they disagree, then they'll vacate his conviction  
25 and remand it. That's the way the system works and I believe

1 in the system. Now, if I didn't think that they would affirm,  
2 then I wouldn't have ruled that way, but that doesn't mean that  
3 I'm -- you know, in the Ninth Circuit when I was there I had  
4 one of the lowest reversal rates in that Circuit and I'm doing  
5 okay here, but that doesn't mean I don't get reversed  
6 occasionally. And in fact, I've been reversed where the Fifth  
7 Circuit has been reversed by the Supreme Court and my decision  
8 reinstated. That doesn't mean they're bad judges. Maybe the  
9 Supreme Court is wrong. Who knows? So anyway, that's my  
10 ruling, all right?

11 The second objection, counsel objects to paragraphs 13  
12 through 18 and 22 and 25, specifically all of the offense  
13 characteristics. He addresses each individually and concludes  
14 the guideline range is unreasonable and seriously flawed.  
15 Well, okay, I may or may not agree with you on that objection,  
16 but it's not an objection really to the drafting of the  
17 guidelines. It's your objection essentially to what you  
18 believe to be an appropriate guideline calculation based on  
19 what you believe to be the severity of the crime. It isn't  
20 that the probation officer got it wrong. There's no question,  
21 I think, that with respect to all of them she got it right and  
22 based on my review of the evidence and your objection. So the  
23 objection is overruled.

24 Objection number three, you object to paragraph seven  
25 which is restitution in the case. And that's where you

1 requested disclosure of the impact statements. That's denied  
2 as moot because you've had those.

3           Objection number four, counsel objects to paragraph 58  
4 and 60. He knows the defendant's indigent and objects to the  
5 inclusion of any fine as part of the sentence. I have no  
6 intention of imposing a fine in this case because I agree with  
7 you. The defendant has more important financial obligations  
8 and those obligations include restitution. So I am going to  
9 overrule that objection, but it's -- I don't know, it's not  
10 really an objection, it's more of an argument.

11           Objection number five, counsel notes the factors that  
12 may warrant a departure include age, lack of criminal history,  
13 family circumstances and military service. I agree with all of  
14 that, but I don't know that that's really an objection to the  
15 guideline calculation. That's an argument to me as to what  
16 kind of a sentence I should be imposing in this case. So that  
17 objection is overruled.

18           Objection number six, counsel objects to the loss of  
19 two points for acceptance of responsibility. He notes that the  
20 defendant only moved forward with the bench trial in order to  
21 preserve the motion to suppress on direct appeal. Well, that's  
22 all fine and good, but he maintained his innocence when the  
23 evidence was that he was absolutely and clearly guilty, not  
24 only beyond a reasonable doubt, beyond any doubt. And  
25 certainly that doesn't entitle him to acceptance of

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1 responsibility. And I don't, as counsel I think is well aware,  
2 get involved in any way, shape or form in any type of plea  
3 negotiations between the parties. That is not part of my  
4 purview. And in fact, it's absolute reversible error for me to  
5 involve myself in plea negotiations.

6 Objection number seven, counsel submitted additional  
7 factors that may warrant a departure. Again this is argument  
8 to the Court. It isn't really an objection to the calculation  
9 of the guidelines, so it's overruled.

10 His criminal history category is one. The  
11 imprisonment range is 292 to 365 months, and each count carries  
12 a maximum of 240 months. There isn't a mandatory minimum here,  
13 I don't believe is there.

14 MS. RICHARDSON: Count two carries a mandatory minimum  
15 of five years, Your Honor -- I'm sorry, it's count one.

16 THE COURT: Count one, five years. That's right.  
17 Probation is not available, supervised release of five years to  
18 life. I forgot about the count one mandatory minimum. Fine of  
19 50,000 to \$250,000 and a 100-dollar assessment per count.

20 COURTROOM DEPUTY CLERK: The offense level is 40.

21 THE COURT: The offense level is 40, I'm sorry. All  
22 right. Mr. Convery or your co-counsel, I don't know whoever is  
23 going to argue.

24 MR. CONVERY: It's still going to be me, Your Honor.  
25 The better lawyer, the colonel, is helping me with the trial

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1 and I very much appreciate it.

2 THE COURT: Well, I was only a company grade officer  
3 when I was on active duty. I never made it to field grade  
4 because I got out.

5 MR. CONVERY: I was only in the Navy a short time  
6 myself.

7 THE COURT: Go ahead, Mr. Convery.

8 MR. CONVERY: I want to take the Court back for a  
9 moment because it -- as you have carefully reviewed all the  
10 material and it should have been apparent, but if not, I want  
11 to make it apparent. When I file my objections to the PSI, I  
12 do objections, corrections, recommendations, okay. So what's  
13 characterized to you with respect to departures, E and F, I am  
14 struck first by many, many, many, most, not all, of the draft  
15 PSIs that I get they're blank in parts E and F, blank. The  
16 Probation Office says, well, I mean, that's basically my job to  
17 provide them what those factors may be either for departure or  
18 for sentence outside the guidelines. And in this case I'm  
19 going to ask the Court for a sentence outside the guidelines  
20 and I'd like just a moment to explain why.

21 THE COURT: What you're actually asking me for is not  
22 so much a departure, is you're asking me for a variance.

23 MR. CONVERY: I'm asking you for a sentence outside  
24 the guidelines, whether the Court wants to characterize it --

25 THE COURT: Because they're two different things.



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1 It's not what I want to characterize it as. They're actually  
2 two different things and one is a variance and I think that's  
3 what you're asking the Court to do is vary downward.

4 MR. CONVERY: That's absolutely whether under whatever  
5 moniker and whatever name that it needs to be, I'm asking for a  
6 significantly more reasonable sentence in this case than is  
7 called for by the applications of the guidelines that you just  
8 found, level 40 and a criminal history category of one for a  
9 sentence of 240 months based on the statute. Your Honor, I  
10 provided, and I rarely do this, I provided two articles to the  
11 probation officer. Again not for objections, but so that the  
12 material would be considered and so that it would be a part of  
13 the PSI. I don't necessarily think the PSI was designed as an  
14 adversary document. I believe that and I've sat through  
15 countless interviews where the probation officer tells the  
16 defendant that they don't work for the prosecution, they don't  
17 work for the defense, they work for the court, they're going to  
18 be fair and right on down the line. They want to put  
19 everything that the defendant means to get across to the Court  
20 and they want to put everything that the prosecution wants to  
21 get across to the Court. So some of my objections, some of the  
22 information that I give to Ms. Holley is in order to accomplish  
23 that so that the addendum will have the information that  
24 essentially acts like a sentencing memorandum.

25 In this case, a sentencing memorandum to you would say

1 no more than is in those objections that you've characterized  
2 as argument. That is the sentencing memorandum. I ask you to  
3 please --

4 THE COURT: Well, it is argument. That's what you're  
5 supposed to be doing. You're supposed to be arguing on behalf  
6 of your client.

7 MR. CONVERY: And I am. And I appreciate the Court's  
8 attention to that. But what's called the Troy Stabenow  
9 article, *Deconstructing the Myth of the Guidelines*, I point out  
10 in that argument it's well known within the legal literature  
11 and within the courts, okay, Reviewing Circuit Courts who have  
12 looked at the sentencing guidelines and the congressional  
13 interaction as opposed to any empirical evidence from '97 to  
14 the present have shown that it's congressional interference, if  
15 you will, that puts everyone if not a first offender over a  
16 weekend for less than ten dollars worth of child pornography at  
17 what's essentially the max. It's a statute now where the  
18 guidelines give you no real guidance. It's the max. Almost  
19 everyone is the max.

20 My objections in terms of the specific offense  
21 characteristics, all of which are dealt with in that article or  
22 many of them, there's always a computer, there's always certain  
23 things. If you have sex with toddlers, pictures with sex with  
24 toddlers, it's always sadistic and masochistic. These  
25 things -- and it escalates things all the way to the basic

1 offense level itself, whereas in a drug case it's the amount of  
2 the drugs. In a child porn case, it's the amount.

3 This is a single kind of download of thumb nails of  
4 videos. So you take a very short three-minute video and you  
5 break it into still photographs and it's an enormous, it just  
6 reaches the max quite quickly almost all the time. So over the  
7 course of time, the last statistics I have between 2006 and  
8 2016, it went from 20.8 percent of District Judges in  
9 sentencings varied or gave a sentence outside of this  
10 guidelines, to 2016, 45 percent, 45 percent. It's a tremendous  
11 number when one looks at it. Because as I pointed out -- and  
12 if I'm a bit touchy today it's because I end up, rightly or  
13 wrongly, when I perceive the Probation Office as being another  
14 adversary, then I feel like I'm fighting too many people all at  
15 once.

16 THE COURT: Well, let me tell you I've worked with  
17 this probation officer for eight years and I have never found  
18 her nor did I find her in this case to have taken a position  
19 which would lead me to any concern whatsoever that she was  
20 acting on behalf of the government.

21 Now, let me tell you something else. When I was Chief  
22 Judge of the District of Hawaii, there was an incident where  
23 there was a probation officer who I felt was crossing the line  
24 and becoming more of an advocate for the government than that  
25 probation officer should have and I took appropriate steps to

1 make sure that that stopped and it did. I won't tolerate that,  
2 but as I said, I get the information from the Probation Office.  
3 Some of it is empirical, others isn't. In this case, you know,  
4 I did not find that she was taking a position. I did find, you  
5 know, the fact of the matter is that I sat through this entire  
6 trial, I was the one who made the decision and I went into it  
7 with an absolutely open mind. And I have found defendants not  
8 guilty in bench trials where I felt the government simply had  
9 not proven its case beyond a reasonable doubt. And in this  
10 case, the government proved its case beyond any doubt, so she  
11 didn't do anything here.

12 Now, if the evidence appears in her report to kind of  
13 favor the position taken by the government, it's because that's  
14 what the evidence said.

15 MR. CONVERY: Well, I respectfully disagree.

16 THE COURT: Well, I understand you disagree. You're  
17 representing your client.

18 MR. CONVERY: No, it's more than -- I like to think  
19 I'm a bit objective also. I'm representing my client, but I'm  
20 not here just to bark. In other words, I believe in this  
21 court, I believe in facts, I believe in being an officer of  
22 this court and I have nothing but respect for you and I've  
23 known Maria Holley an awfully long time. I don't agree, but I  
24 respect what -- and I'm not taking any -- I have no time or  
25 inclination to make any personal attack at Ms. Holley, so if

1 that is the impression the Court has got --

2 THE COURT: Well, I got the impression from your  
3 statement that you felt that the report in this case was  
4 one-sided and I don't think it is one-sided. I do think that  
5 the, unfortunately for your client, the facts do not support an  
6 acquittal, but strongly supported a conviction and so she was  
7 laying out the facts. That's all it was.

8 MR. CONVERY: Two things in particular. With respect  
9 to the motion to suppress and where I've made it readily  
10 apparent what I want to do in the Court's opinion about  
11 appealing the motion to suppress, the transcript in this case  
12 will reveal that after a day long trial about the motion to  
13 suppress the Court's comments on the record were I'm inclined  
14 to grant this, I'm going to grant this, I can see me granting  
15 this and suspending then for the second hearing the rest of the  
16 motion to suppress.

17 After which time, the government raised good faith,  
18 and good faith saved this search, okay. I've read the Court's  
19 opinion and good faith saved this search. So the  
20 characterization of what the search is all about, and I do  
21 agree that the Circuit Court is going to make the ultimate  
22 determination, but all this individual wanted to do, has ever  
23 wanted to do was appeal that. He's never contested his guilt,  
24 the defense didn't put on any evidence, the defense barely  
25 asked the government witnesses any question and we don't

1 quibble with the Court's finding or characterization. The  
2 objection was simply that when you do that for a legal reason,  
3 should you be denied the two points for acceptance of  
4 responsibility. I accept the Court's thing. What I don't  
5 appreciate is the inclusion of what the government says is plea  
6 negotiations between the defense and the government and I'd  
7 like to have that stricken from the addendum and not appear in  
8 the report. And I'd like the Court to say I'm not going to  
9 consider that at all because I don't think it's appropriate --

10 THE COURT: I didn't consider -- I never consider plea  
11 negotiations. I didn't know about -- I didn't even know there  
12 was any plea negotiations until I started getting ready for the  
13 trial.

14 MR. CONVERY: Okay. Well, I object to that part of  
15 the addendum to the report.

16 THE COURT: But it doesn't make any difference  
17 because --

18 MR. CONVERY: I still object. I'd like a ruling on it  
19 because that's what the Rules of Evidence are and that's what  
20 the Circuit says. I'm trying to be -- I understand --

21 THE COURT: I have no problem at all directing that  
22 that be stricken from the record.

23 MR. CONVERY: Thank you.

24 THE COURT: Because I didn't consider it anyway. It  
25 doesn't make a bit of difference to me. The only thing I was

1 concerned about at the trial was what was the evidence. And as  
2 you have conceded, the evidence supported his conviction, on  
3 the evidence, okay? Now, your position is different with  
4 respect to the motion to suppress.

5 Now, I think any comments that I may have made in  
6 going up to my final ruling were honest comments made at the  
7 time based upon the record at that time. And to be honest with  
8 you, yes, there were some concerns that I did have about the  
9 method in which the evidence was obtained, but, but in  
10 reviewing all of the evidence again, as I point out in my I  
11 think rather comprehensive order which I always put out -- I'm  
12 not one of these judges that just simply says, based upon the  
13 facts and the rulings, the motion to suppress is denied. I see  
14 that all the time. I think it's totally unfair to the  
15 defendant. I think it's unfair to the government and I also  
16 think it's grossly unfair to the Court of Appeals. And a lot  
17 of judges have told me over the years that I'm nuts for writing  
18 these comprehensive orders because it gives much more  
19 opportunity for the Court of Appeals to pick apart my ruling.  
20 Good. They should have that opportunity. They should have the  
21 opportunity to know and see why I ruled, why I took a position.  
22 And if that means that I get reversed, then that's what it  
23 means, then I deserve to be reversed. But to hide the ball is  
24 not in my view the right way for a judge to behave. I believe  
25 in the Court of Appeals.

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1           Now, with respect to your concern that somehow I have  
2       seen this and it's somehow going to sway me in some way, I've  
3       been at this a very long time, as you know, this isn't swaying  
4       me one way or the other. There are frequently in criminal  
5       cases plea negotiations that go south. Doesn't mean anything.  
6       Nothing at all actually.

7           So do you have any other argument on behalf of your  
8       client?

9           MR. CONVERY: I do, Your Honor.

10          THE COURT: All right. Go ahead.

11          MR. CONVERY: What I really was getting into is that  
12       the items that you've talked about in the objections, I move  
13       and I'm asking you to consider those for a variance in this  
14       case.

15          THE COURT: I understood that.

16          MR. CONVERY: I want to add what the defense has  
17       provided, Dr. John Fabian's kind of psycho sexual kind of  
18       review in a forensic sense to where the doctor's --

19          THE COURT: Yes, let me tell you something, I reviewed  
20       that too and I am well aware that I believe he said it was  
21       something like ten or eleven percent chance of him being  
22       recidivist or very low likelihood of recidivist, is that right?

23          MR. CONVERY: It's very low and actually the  
24       statistics bear out even less than that.

25          THE COURT: All right. I reviewed all this stuff,



1 Mr. Convery.

2 MR. CONVERY: I'm urging it simply as a reason. I  
3 appreciate the fact the Court has reviewed it, that the Court  
4 has reviewed the family history, which I think is common, but  
5 unique, significant in terms of immigrant family from Korea who  
6 come to the United States and with their nose to the grindstone  
7 continue to work and work. The military service, we know that  
8 it's this aspect, it's this item that destroys that dream and  
9 it's his fault in the sense of the sexual assault that was  
10 being investigated was consensual. The reason for wanting the  
11 accuracy of the facts was to show that it was not a sexual  
12 assault. There was no sexual assault.

13 THE COURT: I don't think the government takes that  
14 position, but I'm sure we'll hear from counsel. I didn't find  
15 him guilty of sexual assault. That wasn't part of the trial.  
16 I didn't take it into consideration, except for the fact that  
17 it provided the context in which the phone was searched. I  
18 mean, obviously that was part of it.

19 MR. CONVERY: Yes, the character letters which I think  
20 are truly heartfelt --

21 THE COURT: I've seen those.

22 MR. CONVERY: -- honest with the Court about those  
23 aspects of things. I think that I want to talk very briefly  
24 about factually in this case the defendant was arrested in  
25 February, the PSI I think now reflects the correct dates, based

1 on the seizure of the phone and the finding of the snippet or  
2 the thumbnail of the child pornography offense well before any  
3 forensic review of the phone. So the defendant was placed in  
4 Geo in February of 2019. The defendant was in Geo for some  
5 eight months because the Magistrate Judge believed that he  
6 should get a bond, but didn't know what the military was going  
7 to do. And so he was in Geo for that time.

8 When the military kind of administratively processed  
9 him out of the military, the Magistrate Judge had already  
10 determined the release was appropriate, so he was released. He  
11 went back during the peak, if you will, of COVID to Maryland to  
12 his parents' house where he was incredibly restricted in terms  
13 of -- it was released essentially to his parents' house. And  
14 what I mean by that is he wasn't allowed in the backyard. He  
15 was in the house. Within the military, military judge would  
16 find that to be confinement and give credit for it. I'm asking  
17 the Court to consider that, to consider both COVID and that  
18 issue of, you know, not being able to assist his parents, not  
19 in terms of working for the family, in terms of being  
20 supportive and having to be supported himself and being  
21 extremely restricted.

22 I am asking the Court to consider abhorrent behavior  
23 in this case, that there's no evidence of any ongoing activity,  
24 no evidence of past activity save for one comment during the  
25 negotiations over, Well, how do I know? I haven't seen them

1 before. The objection that had to do with the complete  
2 negotiation between Logo and then PFC Song, Specialist Song.

3 THE COURT: Didn't he return, he had returned one he  
4 had already seen? Am I wrong here?

5 MR. CONVERY: You've already overruled that objection  
6 which was to the enhancement that's for transfer for a thing of  
7 value, under the idea that during these negotiations that Logo  
8 sends him some thumbnails which he perhaps -- we don't even  
9 know if he reviews a couple, all of them forensically, but he  
10 sends them back.

11 THE COURT: Because he's allegedly already seen them,  
12 so it doesn't -- that isn't consistent with this is the first  
13 time.

14 MR. CONVERY: That's not -- that's not what the facts  
15 reveal. The facts in this case do not reveal to this Court,  
16 any reasonable person, that there has ever been another time  
17 except for a comment in terms of the thumbnails that How will I  
18 know if it's things I haven't seen before.

19 And there's some other comments about the quality of  
20 the photographs. And all this back and forth happens very  
21 quickly. I wasn't even objecting --

22 THE COURT: I was just -- Mr. Convery, excuse me, I  
23 was just addressing your comment when you said there was  
24 nothing to suggest that he had ever done this before. Well,  
25 there is something to suggest he had done it before.

1 MR. CONVERY: Okay, Your Honor. My other reasons  
2 other than COVID, the incarceration, I'd like him to get credit  
3 for the time periods of incarceration.

4 THE COURT: Well, as you know -- I assume what you're  
5 asking me to do is to take into consideration as I'm sentencing  
6 because you know full well that I can't assess credit. That  
7 has to be done by the Federal Bureau of Prisons in the first  
8 instance.

9 MR. CONVERY: I am absolutely asking you to take into  
10 consideration in terms of fashioning a reasonable sentence.  
11 And whether we call it a variance or whether we call it a  
12 sentence outside the guidelines, I call it a sentence outside  
13 the guidelines.

14 THE COURT: Okay.

15 MR. CONVERY: Whatever the Court would like to call  
16 it, Mr. Song is desperately in need of it. As a first-time  
17 offender with a criminal history category one, the overarching  
18 objection throughout my objections was that the proposed  
19 sentence is unreasonable. It may meet the technical  
20 requirements of a guideline that has been designed with no  
21 empirical basis, none. That's designed to provide the Court  
22 with a calculation that arrives at the max. Well, we're there.  
23 And I would suggest that his age, his lack of criminal history,  
24 his family circumstances, his military service, the whole COVID  
25 involvement in this case for this particular defendant, his

1 extreme conditions of release from incarceration and 5K2.20  
2 abhorrent behavior policy provision, I think is entirely  
3 appropriate to warrant a sentence significantly less. The time  
4 period is there, the short duration of this. Again we're  
5 talking about conduct that's going to be -- or that the issue  
6 could be greatly expanded by a comment that the defendant made.  
7 Nothing was on any of the other devices, nothing to indicate  
8 there was any other child pornography anticipation. No  
9 investigation results to anticipate that there was any other  
10 child pornography event or example.

11 The prosecution is now going to point out the same  
12 comment, the same comment. And one of the things that didn't  
13 make it to the facts of the PSI that was in my objection was  
14 where I got this information about the bickering back and forth  
15 in the negotiations was from the government's findings of fact  
16 that were submitted to the Court. I rather think that's  
17 significant, only in the sense of why I believe that a variance  
18 in this particular case is warranted and necessary to do  
19 justice to be reasonable. There is no question that he's going  
20 to serve time.

21 Now, the final thing I'd like to leave the Court with  
22 and I can get back up only to make a recommendation in terms of  
23 incarceration, but this Court through its years of experience  
24 knows and has watched grow, especially in child pornography  
25 case, those conditions of supervised release and special

1 conditions of supervised release are going to be imposed for  
2 many years, five, life, whatever the Court determines, this  
3 individual, this first offender is going to be supervised for  
4 many, many years, subject to evaluation. You know, definitely  
5 requires treatment, programs, treatment. Let alone I want to  
6 address the restitution issue. The restitution, no one, no one  
7 would question the victimization of the girls, either at the  
8 hands of their own family or other people. No one would  
9 question far down the road these people, most of them are 18  
10 years old or more. No one would question the propriety of  
11 restitution. The minimum of restitution that the probation  
12 office gets in these cases is \$3,000. We would object to  
13 anything more than \$3,000.

14 I've now reviewed all those documents and the amounts  
15 requested bears no relationship to the particular case, to this  
16 particular case to the amount of time that he viewed it or to  
17 what he did with it, because this is only a receipt and  
18 possession case. So to suggest that because the plaintiff's  
19 attorney suggests that they want 10,000 in this case or that  
20 they're asking for -- another is asking for 10,000, one is not  
21 asking for anything, so the Probation Department is prepared to  
22 say, well, the minimum there ought to be \$3,000. At most, the  
23 Court should take the victims in this case and provide them  
24 with the \$3,000 in each instance. Having done that, the Court  
25 should also rule, we would ask, that the Court recognize that

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1 with a lengthy, even a five-year supervised release to allow  
2 the defendant to pay that over time throughout -- some during  
3 incarceration, but throughout his supervised release before it  
4 becomes a matter for collection or a judgment on the part of  
5 the Collection Department of the United States Attorney's  
6 Office. That will do the most to hopefully try to ensure that  
7 the victims get some restitution from Mr. Song. It's a  
8 mandatory act, I'm not quibbling about that, but I do think  
9 that what's more appropriate, what's justified, one could look  
10 at these things and make -- take a position that a particular  
11 amount in this case is just not justified by what's submitted  
12 at all. But the victim impact statements are heart wrenching,  
13 I understand the victimization and respect the fact that the  
14 act says the Court should impose some kind of restitution.

15           After his incarceration in Geo and going home, Hae  
16 Yeong Song has demonstrated both before this event and during  
17 this event that he's able to follow the rules, that's both  
18 inside the facility and outside the facility and coming back  
19 and forth to San Antonio. He was 26, I believe, at the time of  
20 this incident, 25, 26. I think that's significant.

21           I ask the Court to take all of those things and I  
22 really do -- I've appeared before this Court on many, many  
23 times and I have nothing but respect for this difficult task  
24 that you have before you, but I ask you to in this case temper  
25 justice with mercy and understand that for a first offender

1 with no criminal history, the max is just absolutely not the  
2 appropriate sentence. I would respectfully submit that the  
3 mandatory minimum is the appropriate sentence, that that makes  
4 more sense than both empirically with the information that's  
5 been provided to the Court. Thank you very much.

6 THE COURT: Does Mr. Song wish to address the Court?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: All right. You can take your mask off,  
9 Mr. Song, because otherwise the reporter isn't going to be able  
10 to understand you.

11 THE DEFENDANT: Good morning, Your Honor. To add on  
12 to what Mr. Convery was saying, I just ask that the Court does  
13 consider everything that has to do with the case, that my life  
14 currently is in your hands, so I ask that you show mercy so  
15 that I can go from this into turning my life into a better  
16 outcome towards the end of it, not define my life from the  
17 events that led to this current moment. I'm more than willing  
18 to do everything I can, taking programs, taking all the  
19 educational opportunities to try to make up for everything, all  
20 the mistakes I've made in my life. Thank you.

21 THE COURT: All right. Okay, Ms. Richardson. It's  
22 your opportunity.

23 MS. RICHARDSON: Not one word has been spoken by the  
24 defendant today or apparently when he talked to Dr. Fabian  
25 about his acknowledgment, his remorse for the violent, horrific



1 abuse of the children whose crime he actively, intentionally,  
2 purposefully, selectively participated in. So if I'm a bit  
3 touchy this morning, it's because when we begin to engage in  
4 relegating the exchange of material that memorializes the  
5 sexual assault of children to a comparison of the distribution  
6 of narcotics, it makes me a bit touchy.

7 Federal District Judge John Adams in United States  
8 versus Cunningham used a quote that is attributable to Nelson  
9 Mandela, *"There can be no keener revelation of a society's soul*  
10 *than the way in which it treats its children."* The judge went  
11 on to say, *"Given the statistics surrounding child pornography,*  
12 *we are living in a country that's losing its soul."* Because  
13 how is it when we speak in public about the horrific crimes  
14 that are happening to children and they're not just happening  
15 to those children one time, they are being videotaped, audio  
16 recorded, uploaded into a system that now is forever  
17 memorialized. They are then traded and trafficked at the same  
18 level as baseball cards. But then we come into court and  
19 something changes and all of a sudden it's a mere couple of  
20 videos and photographs over a weekend. The government  
21 strenuously objects to any downward departure because this is a  
22 crime of violence and it should be treated accordingly.

23 With regards to the repetitive use of the reference  
24 that this only occurred over a weekend -- and Dr. Fabian's  
25 report and his conclusions should be completely discounted

1 because that's based on the self-reporting, the self-disclosure  
2 of the defendant who also keeps saying, Well, it was just a  
3 couple videos, it was just ten dollars.

4           Honestly, the fact that it was only ten dollars is  
5 even more repulsive to me than if it had been \$10,000. But if  
6 the Court will recall from Government's 12A during the trial,  
7 which was the transcript of the Instant Messages that were  
8 going back and forth between the defendant and the Korean  
9 distributor, on the platform of Telegram, the very first entry  
10 is actually from the defendant. And he says to the individual,  
11 *"Mr. Hush 18?"*

12           And the other guy says, *"Yes."*

13           He says, *"Is Tumbler deleted?"*

14           The other guy says, *"Yes."*

15           He says, *"Why?"*

16           Mr. Hush 18 says, *"I don't know."*

17           He says, *"Wonder if someone reported it."*

18           The Court will recall that the expert, Special Agent  
19 Jeffrey Cunningham, talked about the fact that Tumbler which  
20 had been actively trading child pornography had been taken  
21 down. Mr. Hush 18 had been a part of that. The defendant knew  
22 that. This was not his first moment in the midst of all this.

23           Then there's multiple pages going back and forth  
24 discussing whether or not how many pictures and how many videos  
25 he can get, specifically asking for elementary age children,

1 specifically asking for Korean children, not American children.  
2 There's even a discussion where Mr. Hush 18 reminds him, "You  
3 could get in trouble, it's illegal in America." He says, "Only  
4 if I get caught." He knows what to do with it. This is not  
5 his first foray.

6 He then begins discussing -- he receives a video and  
7 he tells Mr. Hush 18, "The first video was about someone saying  
8 a capture of an interaction with a boyfriend. The second that  
9 was sent contained the first reporting. Wondering if there are  
10 videos that connect with this one."

11 He's watching them close enough to be able to tell  
12 that the clip he got has a part two and a part three. That's  
13 why NCMEC has identified entire series. Why? Because once you  
14 watch the first one, you're going to go look for part two and  
15 part three. He knew that. He tells Mr. Hush 18, "I just  
16 watched one. It's only ten seconds of taking off clothes."  
17 And then he asks for only Koreans. He then begins to discuss  
18 with Mr. Hush 18 whether or not he's going to get the Legend  
19 video. Individuals actively engaged in the trading and  
20 collection of child pornography know that the Legend video is a  
21 compilation of some of the most horrific video footage.  
22 Mr. Hush 18 informs him, "That one is expensive." But he wants  
23 it included in his collection. This is not a person that has  
24 only engaged in this activity for one weekend.

25 MR. CONVERY: I'm going to object to the testimony of

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1 the assistant U.S. attorney and ask that that be stricken and  
2 the Court not consider it, although the damage is done once she  
3 testifies. She has testified. Nothing in the transcript,  
4 nothing in that highly prejudicial statements that she just  
5 made other than her own opinion is available.

6 THE COURT: She's making argument. Argument is not  
7 evidence. I heard the evidence, I saw the evidence.

8 MR. CONVERY: And the ruling on my objection?

9 THE COURT: I'm going to overrule your objection. She  
10 has the right to make her argument. I will disregard it if I  
11 think it's impertinent.

12 MR. CONVERY: I specifically object to that if you're  
13 not going to disregard it, then you're going to consider it.

14 THE COURT: No, I'm not.

15 MR. CONVERY: Well --

16 THE COURT: I'm going to consider that she's made an  
17 argument, she's entitled to make an argument just like you are,  
18 counsel.

19 MR. CONVERY: She clearly testified. That's the  
20 defense objection.

21 THE COURT: I don't think anything that she says here  
22 which is not under oath is testimony. She's making an argument  
23 to me, counsel, and you're entitled to make an argument. She's  
24 drawing an inference from what she believes the evidence  
25 showed. That's all she's doing. And I may agree with it or I

1 may not agree with it. Go ahead, counsel.

2 MS. RICHARDSON: With regards to Mr. Convery's  
3 comments and submission of the Stabenow articles, the 2009 is  
4 his attack, attacking a federal public defender on the  
5 guidelines. His 2011 is a proposal for reform. The  
6 legislature has looked at and reformed and modified legislation  
7 on a number of occasions since 2011.

8 THE COURT: And going back to your previous objection,  
9 Mr. Convery, you've submitted to me and I've looked at  
10 materials which were completely outside the record and really  
11 have nothing in direct -- there's no direct connection with  
12 this case. But they're argument just like she's making  
13 argument. So you can't say to me, Judge, I want you to look at  
14 these articles written by a federal defender on one hand and  
15 somebody else that urge you that the guidelines are, you know,  
16 completely out of control, and on the other hand she draws an  
17 inference from the evidence and I'm not supposed to consider  
18 that. I'm supposed to consider yours, but not hers. I mean,  
19 it is what it is. The Court looks at everything submitted by  
20 counsel. I recognize that counsel are advocates for their  
21 clients. You're advocating for your clients, you're taking the  
22 very best position you can and you're submitting the materials  
23 to me and I, in this case and in every case, will look at it.  
24 Some of it might inform me, others might not. Just because  
25 somebody says it doesn't mean I believe it or will take it into

1 consideration. Go ahead.

2 MS. RICHARDSON: Since the publishing of both of those  
3 articles, Congress has had an opportunity and has, in fact,  
4 revised statutes in this area. They have had all of the data,  
5 all of the information brought before them. The Fifth Circuit  
6 has also spoken to these very articles and the argument about  
7 the guidelines and whether or not they are based upon empirical  
8 data and whether or not that is relevant to the consideration.  
9 Recognizing that they are advisory, but that they are advisory  
10 based upon direction that they have received.

11 With regards to Mr. Convery's statement that all of  
12 the defendants that are prosecuted for receipt of child  
13 pornography and possession of child pornography coming out at  
14 the max, that's absolutely just not true. And it is not true  
15 that all defendants should be at the maximum. In fact, if you  
16 consider taking a defendant charged with receipt of child  
17 pornography, on the one hand you can have a defendant who has  
18 downloaded photographs of a 17-year-old female in a situation  
19 that qualifies as child pornography. If she's not -- if  
20 there's no bestiality involved, there's no torture involved,  
21 it's not done for the exchange of money, the guidelines on that  
22 are going to be on the low end at the statutory mandatory  
23 minimum. That's provided that the defendant has no criminal  
24 history. That is totally different from what we have here.  
25 The enhancements are in place and oftentimes in this courthouse

1 the cases we see are the ones that have all the enhancements.  
2 That's because, as everyone knows, federal resources are finite  
3 and the cases that we prosecute are the ones that oftentimes do  
4 have all the enhancements, but that is not to say that every  
5 single defendant that commits the crime of receipt of child  
6 pornography is going to come out at a 240-month guideline.

7 The guidelines in this case, this case absolutely  
8 calls for the application of those guidelines. There's no  
9 argument that can be made on any of those adjustments that  
10 would bring it to a place of them not being applicable. And so  
11 he guidelines out because that's the crime he committed.

12 Despite Song's efforts to minimize his crime and his  
13 lack of recognition of the nexus of his crime, small children  
14 being brutalized, he has participated in one of the most vile  
15 and heinous crimes in our society. The Supreme Court, Congress  
16 and courts across the country have repeatedly recognized the  
17 pain and suffering caused by the sexual exploitation of  
18 children and a sentence of 240 months addresses the severity of  
19 his crime. While nothing makes these children whole for being  
20 subjected to the pain that they've been subjected to and the  
21 suffering at the hands of perpetrators like Song where every  
22 single day wherever they go for the rest of their life they are  
23 always wondering, Has that person seen me in my most horrible  
24 moment.

25 A severe sentence at least gives those victims the

1 comfort that at least this defendant will not be downloading  
2 and trading their pain like baseball cards for a very long  
3 time.

4 THE COURT: All right. You know, these are always  
5 very difficult cases principally because of -- obviously  
6 because of the subject matter of the cases. And I think we as  
7 a society certainly have a strong feeling about any type of  
8 injury to children and this is certainly the kind of injury to  
9 children which is most concerning, to put it mildly. And  
10 unfortunately, what drives child pornography is the desire of  
11 individuals such as the defendant to observe it, to view it.  
12 It's very much in a way, although I do not draw the parallel  
13 between drug trafficking and child abuse in a direct line, but  
14 we know that there would be no drug trafficking if there were  
15 not individuals who were willing to purchase drugs and to fund  
16 their consumption because there would be no market for drugs.  
17 And we also I think know that to a large extent there wouldn't  
18 be the tremendous uptick in child pornography if there weren't  
19 individuals like the defendant who were interested in  
20 purchasing these pictures and/or trading them for remuneration  
21 in some way, shape or form. There just wouldn't be the market.

22 Now, does that mean there wouldn't be people who abuse  
23 their children or abuse other children for their own pleasure  
24 and might video it and put it up online? Yeah, sadly I think  
25 that would still occur to some degree, but certainly not to the



1 degree that we see it now. I think that this has become a  
2 profit-driven situation to some degree. I mean, Mr. Song paid  
3 for his images. The individual who got them obviously got them  
4 and in all likelihood through some transactions that he made  
5 and then he's reselling them because he obviously wasn't the  
6 one who was the perpetrator in all of these videos. These were  
7 all individual different people over time.

8           Sadly, one of my responsibilities at a trial like this  
9 is to view the evidence, so I have seen these videos, because  
10 the government has to prove beyond a reasonable doubt that  
11 these are, in fact, child pornography. And as Ms. Richardson  
12 can attest, there have been child pornography cases where the  
13 government has submitted to me videos and/or pictures or maybe  
14 it was your colleague, I can't remember, where it was really  
15 impossible to tell whether these were juveniles or not. They  
16 looked like adults. Their physical characteristics would have  
17 been the characteristics of an adult. And in those instances,  
18 not that I condoned those videos or the pictures in any way,  
19 shape or form, but they simply could not be child pornography.  
20 That was not the case in any of these images. These were  
21 clearly young children, very young in many instances. And  
22 these children were in some of these videos obviously being  
23 raped and worse and it was hard to watch, there's no question  
24 about it, it's difficult. And I think that defense counsel  
25 doesn't contest that, I'm sure. That's just the way it is.

1           Now, one of my responsibilities under 18 U.S.C.  
2   3553(a) is to look very carefully at the so called sentencing  
3   factors as laid out there and I'm not going to read them off  
4   here. Suffice it to say that I know what they are by heart and  
5   I look at them very carefully. As my friend former Justice or  
6   retired Justice Kennedy and I having lunch, I said, you know, I  
7   said to him when we were -- when we're looking at these  
8   guidelines -- because he had written several of the guideline  
9   opinions when this whole guideline situation was being flushed  
10  around. I've been around long enough to have been around  
11  before the guidelines and then when the guidelines were  
12  mandatory and now when they're advisory. He said, You know,  
13  the bottom line is that a District Judge -- and he even wrote  
14  this in an opinion -- a District Judge should look at the whole  
15  person, the whole person. Look at the offense, look at the  
16  circumstances, look at the whole person.

17           One thing I can't do and I don't do is sentence for  
18  rehabilitation purposes. That's not part of the sentencing  
19  guidelines, but the crime here is serious, there's no question  
20  about it and he's guilty of it. And he, as counsel has  
21  suggested, has got to serve a prison term for it. I have to  
22  say, however, that there are degrees of culpability in the  
23  process. I mean, it isn't one fits all. That's why we have  
24  the guidelines and that's why the judges were given the  
25  discretion and the Supreme Court said it was constitutionally

1 imperative that we do have discretion to vary. And it's also  
2 important to remember, and I think we often forget this, that  
3 the guideline range is an advisory range and it is a fatal  
4 error in sentencing for a judge to take the guideline range and  
5 look at it as more important than any of the other factors. It  
6 is a starting point, as the Supreme Court has pointed out and  
7 the Fifth Circuit, but it is not a factor which should be given  
8 some greater weight than all of the factors taken together.

9 Now, it happens that a lot of time and effort was put  
10 into creating these guidelines and frequently I find that a  
11 sentence within the guidelines is an appropriate sentence, but  
12 it's because I have looked at the conduct and the 3553 factors  
13 and determined that a sentence within the guidelines is an  
14 appropriate sentence and not because I simply accept the  
15 guidelines as some sort of mandatory place in which I have to  
16 sentence the defendant, because it isn't. There's nothing  
17 mandatory about the guideline range. I look at all of the  
18 factors and I have to make a determination as to the  
19 defendant's conduct when placed against all of the other  
20 factors starting with the guidelines, but not ending with the  
21 guidelines as a mandatory set of parameters which the Court  
22 must sentence the defendant within.

23 And it's also important that the Court sentence the  
24 defendant to an appropriate sentence which is not more serious  
25 in terms of its imposition than is called for to follow the

1 very careful outline of the 3553 factors.

2 Now, this defendant engaged willingly in the purchase  
3 of the material which is clearly and absolutely child  
4 pornography and some of it of the worst order and so he is  
5 going to serve a very serious sentence as a result of that.  
6 And looking at the 3553 factors, he deserves such a sentence.  
7 However, however, the Court does not believe that a sentence  
8 within the guidelines here is appropriate. It is just simply  
9 too long under all of the 3553 factors to address the conduct  
10 for which the defendant himself was found guilty. Not because  
11 I think that the images weren't horrific, they were. And not  
12 because I don't think the defendant deserves a serious  
13 punishment, which I do, but because within the 3553 factors and  
14 looking at the parameters of what is statutorily possible in  
15 this case, the defendant simply doesn't meet the criteria for a  
16 sentence which is over 20 years. It just is too long a term of  
17 imprisonment and is harsher than what is called for to meet the  
18 ends of justice, in my view. Now, that doesn't mean, as I  
19 said, that he is entitled to some sort of menial sentence  
20 because the conduct that he engaged in was serious.

21 So it is the judgment of this Court, having carefully  
22 and thoroughly considered the 3553 factors, the evidence in  
23 this case, the arguments of counsel, all the materials which  
24 have been submitted by counsel for both sides, that as to count  
25 one the defendant is to serve a term of imprisonment of 170

1 months. As to count two, 60 months, which will run  
2 concurrently for a total of 170 months which is, I don't know,  
3 how many years, 14 years. That is an adequate sentence here to  
4 serve the interest of justice. Anything longer, in my view,  
5 would be not an appropriate sentence given his age and the  
6 total circumstances.

7 Now, of course, had he encouraged or engaged in the  
8 actual production, that would have been another story entirely.  
9 And I have myself sentenced individuals to life in prison who  
10 have engaged in that kind of behavior. There is no term of  
11 imprisonment which is long enough for those people, but this is  
12 a fair sentence in my view.

13 Now, as to supervised release, I am going to impose a  
14 ten-year term of supervised release upon the defendant and that  
15 will be consistent and incorporate the terms of supervised  
16 release as laid out in this Court's amended order of  
17 November 28, 2016, and the specific terms as laid out in the  
18 presentence investigation and report which I hereby adopt and  
19 to which counsel has indicated they've had a chance to review  
20 with their client and have not filed any objections to.

21 Looking at a fine, the defendant does not have the  
22 money to pay a fine at this time and, therefore, the Court will  
23 not impose one. He must pay the United States a special  
24 assessment of \$100 per count for a total of \$200. The Court is  
25 going to impose restitution to each of the victims in the

1 amount of \$4,500 per victim. I believe that given the  
2 defendant's earning potential when he gets out and during the  
3 term of supervised release, that is a sum of money which he can  
4 repay and that money is due immediately. Of course, he doesn't  
5 have it now, so it will be paid in such terms as the defendant  
6 can amount during his -- do we have to set a payment schedule  
7 for that restitution?

8 PROBATION OFFICER: Not at this time.

9 THE COURT: Now, you did preserve your right of  
10 appeal, Mr. Song, so you have the right to appeal both the  
11 conviction, my denial of the motion to suppress and the  
12 sentence which I have just imposed upon you to the United  
13 States Court of Appeals for the Fifth Circuit by filing a  
14 notice of appeal within 14 days of the entry of judgment. If  
15 you don't have the assets to pay for all or part of the costs  
16 of an appeal, including the services of competent counsel and  
17 transcripts and other materials for your appeal, that will be  
18 provided by the Court at no cost to you. And I assume,  
19 counsel, you're going to be -- are you going to be representing  
20 him during the appeal?

21 MR. CONVERY: No, Your Honor. May I address the  
22 Court?

23 THE COURT: Sure.

24 MR. CONVERY: I had prepared a written notice of  
25 appeal, I'll give oral notice of appeal at this time for record

1 purposes. I've obtained the defendant's signature, we will  
2 electronically file it today and we will also file a motion to  
3 withdraw. Different eyes need to look at this, Your Honor.  
4 Mr. Song and I have talked, I took this case over from a  
5 court-appointed counsel, the financial statements already on  
6 file and I would ask the Court to appoint him with CJA counsel  
7 or the Federal Public Defender's Office.

8 THE COURT: I will refer that matter to the United  
9 States Magistrate Judge for appointment of counsel. I'm going  
10 to grant your motion to withdraw subject to your perfecting his  
11 right to appeal and making sure that there's no lapse so that  
12 his documents and so forth are filed on time.

13 MR. CONVERY: I represent to the Court that I will  
14 follow through and I will make sure that that happens. I would  
15 also ask the Court, this is a unique case because of his  
16 military service. The family is on the east coast, sister on  
17 the west coast. I've conferred with Mr. Song and we would ask  
18 the Court to recommend Butner, it's not just the federal  
19 medical facility, it's also a facility that has had the sex  
20 offender kind of treatment programs.

21 THE COURT: I'll recommend Butner.

22 MR. CONVERY: Or Fort Dix. Those would be within the  
23 BOP's 500-mile rule in terms of his parents' ability to visit  
24 with him.

25 THE COURT: I'll make that recommendation, I have no

1 problem.

2 MR. CONVERY: Thank you. There's Fort Dix, Low --

3 THE COURT: I'm also going to recommend that he  
4 receive mental health treatment during his incarceration so  
5 that he can deal with these issues.

6 MR. CONVERY: He'd like any educational or support --

7 THE COURT: I'll recommend that.

8 MR. CONVERY: -- treatment options, but it's Fort Dix,  
9 Low, Butner, Low. The Court will recall I think were it not  
10 for the statute at the guilty finding before sentencing, before  
11 the PSI, were it not for the statute, the Court did not appear  
12 to have a problem with him remaining on pretrial release. We  
13 understand that's not the circumstances, we're not asking for  
14 any such thing, but I think it certainly merits a  
15 recommendation for Court for low category if the Bureau of  
16 Prisons does classification degrees. Thank you.

17 THE COURT: All right. Anything else, counsel?

18 MS. RICHARDSON: Your Honor, for the record, can the  
19 judgment reflect the forfeiture consistent with the preliminary  
20 order contained in document number 109.

21 THE COURT: The judgment will so reflect.

22 MS. RICHARDSON: Thank you.

23 MR. CONVERY: Does that include -- just for -- there  
24 were some electronics items that had no child porn that have no  
25 relation to the case and we'd like to have those returned.



1 THE COURT: Whatever doesn't have any relationship to  
2 the case or is not evidence can be returned to the defendant.  
3 And the Court finds that outside of the defendant's future  
4 earning capacity for restitution purposes, that he does not  
5 have sufficient funds to pay the JVTIA here, so I'm not going to  
6 impose it.

7 I'm sure that counsel can work this out. I don't need  
8 to be involved. If you can't work it out, then you can contact  
9 me and I will take a look at it and see. I mean, the  
10 government is entitled obviously to keep those materials and  
11 needs to keep those materials which may be germane for appeal  
12 purposes or for the Court of Appeals or -- I'm certainly not  
13 going to turn back any material that might in some way, shape  
14 or form contain child pornography, but otherwise, other  
15 material that doesn't have any relevance to the prosecution but  
16 may have been seized by mistake or for some other purpose for  
17 investigative purposes should be returned.

18 MS. RICHARDSON: I'll find out what else there is  
19 because the only thing that's on the forfeiture list is germane  
20 to the case.

21 THE COURT: Yes.

22 MR. CONVERY: Thank you, Your Honor.

23 THE COURT: I should make it very clear that there are  
24 probably very few judges in this country that have had more of  
25 these kinds of cases, had to handle more than I have. I have

1 been told that I had handled a case that had the absolute  
2 greatest number of images and videos that the FBI had ever  
3 seen. It was just an incredible collection, amassed by an  
4 individual over a period of years and years and years of the  
5 most horrific images. That person will never get out of jail.  
6 I find this crime to be a particularly serious one in our  
7 panoply of serious crimes and my varying downward has  
8 absolutely nothing to do with my view of sexual assault victims  
9 who I have the greatest empathy for. I have to look at each  
10 case on its own and a 14-year sentence in the federal system is  
11 a very long sentence. It is without possibility of parole and  
12 it's far longer than any defendant would receive in the State  
13 side, even though they might get a, quote, unquote, longer  
14 sentence imposed by the judge, the chances are that they're  
15 going to get out of jail much sooner as a result of the fact  
16 that they are eligible for parole. And I've seen defendants on  
17 the State side -- and I've sat all over the country -- get 25  
18 years or 30 years for these kinds of offenses and be out in  
19 five. He will not be out in five years. He will serve the  
20 full term of his imprisonment and it certainly gives me no joy  
21 whatsoever to impose a lengthy sentence, nor does it give me  
22 any joy to see the kind of material that I had to view. It's  
23 one of the jobs that someone has to do and it has to be done  
24 because our society simply can't tolerate these kinds of  
25 activities. And there's no question that the defendant played

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1 a role as other consumers of child pornography play a role in  
2 encouraging the production and distribution of these materials  
3 because people get paid for it. And unfortunately, it's become  
4 a business. And that is a real sad commentary I'm afraid and  
5 it's all part and parcel in many instances of sex trafficking  
6 which we see is a growing problem in this country. Although  
7 this defendant didn't engage in sex trafficking, he certainly  
8 engaged in the consumption of child pornography. All right.  
9 Is there anything else from counsel? Mr. Convery?

10 MR. CONVERY: No, Your Honor. Thank you.

11 MS. RICHARDSON: Nothing further, Your Honor. Thank  
12 you.

13 THE COURT: Court stands in recess.

14 COURT SECURITY OFFICER: All rise.

15 (10:57 a.m.)

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: February 2, 2022

/s/ Angela M. Hailey

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